Supreme Court, U.S.
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No. 96-1160

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ROBERT RICHARDSON,

Petitioner,

v.

ALBERTSON'S, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner has presented compelling reasons, as set forth in Supreme Court Rule 10, justifying review of the Tenth Circuit's decision.

2. Whether the Tenth Circuit correctly concluded that Petitioner failed to establish a prima facie case of racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e ("Title VII"), and 42 U.S.C. §1981 ("§1981").

3. Whether the Tenth Circuit correctly concluded that the district court lacked jurisdiction over Petitioner's claim under the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.* ("ADA"), based on Petitioner's failure to adequately exhaust his administrative remedies.

LIST OF PARTIES

The petitioner is Robert Richardson. The respondent is Albertson's, Inc. Albertson's, Inc. has no parent companies or nonwholly owned subsidiaries.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

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STATEMENT OF THE BASIS FOR JURISDICTION

The Petition sets forth this information at page 1. Although Petitioner did not include a citation to the statutory provision believed to confer jurisdiction on this Court, Petitioner is attempting to invoke jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

42 U.S.C. §1981(a):

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §2000e-2(a):

It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . . .

42 U.S.C. §2000e-5(f)(1):

. . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . . .

42 U.S.C. §12112(a):

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees,

employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. §12117(a):

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

STATEMENT OF THE CASE

I. Factual Background.

Pro se Petitioner Robert Richardson ("Richardson") was discharged from his job with Respondent Albertson's, Inc. ("Albertson's") for misconduct. Mr. Richardson is an African American who was employed by Albertson's as a baker from 1981 to 1982, and from 1984 to his discharge effective July 15, 1992. (Doc. 46 at Ex. A-61:10-15, 64:19-23; Ex. B-1, ¶2).[1] Mr. Richardson's discharge arose from events occurring on June 2-5, 1992. On June 2, 1992, Mr. Richardson left the store for his lunch break. (Doc. 46 at Ex. A-126:16-127:1; Ex. B-1, ¶4). During this break, Mr. Richardson telephoned the bakery manager, Jacqueline Johnson, and told her he would be late returning to work because he had a flat tire. (Doc. 46 at Ex. D-1, ¶¶3-5). While Mr. Richardson

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[1] References to the record below are to document numbers from the district court docket sheets and to numbered pages within the document, or to exhibits submitted with the document and to numbered pages within the exhibit (see 10th Cir. R. 28.1).

was gone, two police officers came to the store with a warrant for his arrest. (Doc. 46 at Ex. B-2, ¶ 5; Ex. E-1, ¶ 3). The police officers and William Winters, another bakery employee, were at the store's entrance when Mr. Richardson drove into the parking lot. When he saw the police officers, Mr. Richardson drove off and did not return to work that day. (Doc. 46 at Ex. E-1, ¶ 3; Ex. D-1, ¶ 6; Ex. B-2, ¶ 8).

The next day, June 3, 1992, Mr. Richardson called in sick but did not state what the nature of his illness was. (Doc. 46 at Ex. A-141:25-142:7, 142:20-143:13, 147:23-24; Ex. B-2, ¶ 9).

On June 4, 1992, Mr. Richardson arrived for work around 2:00 a.m. Before punching in, he saw Mr. Winters who asked him about the events of June 2, 1992. At that time, Mr. Richardson admitted that he did not return to the store because the police officers wanted him for failure to appear. Mr. Richardson then left the store and asked Mr. Winters to lie if anyone asked him whether he had seen Richardson. (Doc. 46 at Ex. E-1-2, ¶ 4). Three other employees verified that Mr. Richardson had reported to work the morning of June 4, 1992. (Doc. 46 at Exs. F, G and H).

On June 5, 1992, Mr. Richardson called Pat Hildebrand, the store director, and said that he had been ill on June 2nd, 3rd and 4th and had gone to a doctor on June 4th.[2] (Doc. 46 at Ex. A-192:23-195:7; Ex. B-3, ¶ 14). Mr. Hildebrand requested that Mr. Richardson bring in some verification of his story, such as a doctor's note, prescription, bill or receipt. Mr. Richardson failed to

[2] Despite Mr. Richardson's assertion that he was only out sick for one day (Petition at 4), the undisputed evidence shows that he claimed to be sick for a portion of June 2nd, and all of June 3rd and 4th. (Doc. 46 at Ex. B-3, ¶ 14).

produce any documentation. (Doc. 46 at Ex. B-3, ¶ 15). When questioned, Mr. Richardson denied that he had been at the store on June 4th. (Doc. 46 at Ex. B-3, ¶ 16). Mr. Richardson was then suspended pending investigation. (Doc. 46 at Ex. B-3, ¶ 17).

Michael Schwarzkopf, Albertson's Regional Director, Labor Relations, sent Mr. Richardson a letter on June 25, 1992 setting forth the events of June 2-5 as Albertson's understood them. Mr. Schwarzkopf requested that Mr. Richardson respond with any documentation he had to disprove the facts as set forth in the letter, along with a written statement documenting the events of June 2-5. Mr. Schwarzkopf indicated that a decision would be made regarding Mr. Richardson's continued employment by July 15, 1992. (Doc. 46 at Ex. A – Richardson Dep. Ex. 14; Ex. C-1, ¶ 4; Ex. B-4, ¶ 18).

Mr. Richardson responded to this letter with a one-page, handwritten note and a copy of page 9 of the labor contract between Albertson's and the Union.[3] (Doc. 46 at Ex. A – Richardson Dep. Ex. 16; Ex. C-2, ¶¶ 5-6). The information provided was not responsive to Mr. Schwarzkopf's requests. Mr. Richardson provided no verification of his claimed illness or alleged doctor's visit, and failed to even address the facts as set forth by Albertson's. (Doc. 46 at Ex. C-2, ¶ 7). Because Albertson's had

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[3]Page 9 of the labor contract actually authorizes the actions taken by Albertson's. The contract specifically provides that "[a] doctor's certificate or other authoritative verification of illness or occupational or nonoccupational accident may be required by the Employer and, if so, must be presented by the employee not more than forty-eight (48) hours after return to work." (Doc. 46 at Ex. A – Richardson Dep. Ex. at 18 at 9). Moreover, the labor contract emphasizes that any employee "found to have abused sick leave benefits by falsification or misrepresentation shall thereupon be subject to disciplinary action . . . ." (*Id.*)

no evidence supporting Mr. Richardson's version of the events of June 2-5, he was terminated effective July 15, 1992 based on his failure to report for work as scheduled, failure to provide documentation verifying his alleged illness, and Albertson's belief that he falsified his reason for not returning to work, lied about being sick, asked a co-worker to lie for him, and falsely denied reporting to work. (Doc. 46 at Ex. C-2, ¶ 8; Ex. B-4, ¶ 22).

Mr. Richardson subsequently filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging racial and disability discrimination. (Doc. 46 at Ex. O-1). Although Mr. Richardson received two letters from the EEOC requesting information verifying his disability, he failed to provide sufficient documentation. (Doc. 46 at Exs. L and M). A determination letter was executed April 21, 1994. The letter stated that due to Mr. Richardson's failure to provide documentation showing that he was a qualified individual as required by the ADA, the EEOC lacked jurisdiction over this claim. The letter further stated that the evidence obtained during investigation of Mr. Richardson's claim did not support a violation of the statutes. Mr. Richardson was informed by the EEOC that he could "ONLY PURSUE THE TITLE VII CLAIM BY FILING SUIT AGAINST THE RESPONDENT NAMED IN THE CHARGE IN FEDERAL DISTRICT COURT WITHIN 90 DAYS OF RECEIPT OF THIS LETTER." (Doc. 46 at Ex. A, Richardson Dep. Ex. 26 (emphasis in original)).

II. Procedural History.

A. The District Court.

Mr. Richardson filed this action in the U.S. District Court for the District of Colorado, alleging that the termination of his employment constituted racial discrimina-

tion in violation of Title VII and §1981, and disability discrimination in violation of the ADA. (Doc. 1 at 3-5). Jurisdiction over Mr. Richardson's claims was based on 28 U.S.C. §1331. After a period of investigation and discovery, including the deposition of Mr. Richardson, Albertson's moved for summary judgment on all claims pursuant to Fed. R. Civ. P. 56. (Doc. 44 and 45).

The district court granted Albertson's motion, finding that Mr. Richardson had failed to provide any evidence of a disputed issue of material fact. The district court entered summary judgment on the ADA claim on three separate grounds: (1) the events giving rise to the claim occurred prior to the effective date of the Act; (2) Mr. Richardson failed to exhaust his administrative remedies; and (3) Mr. Richardson failed to file his action within ninety days of receipt of the Notice of Right to Sue. The district court granted summary judgment on the Title VII claim based on: (1) Mr. Richardson's failure to file his action within ninety days of receipt of the Notice of Right to Sue; and (2) Mr. Richardson's failure to set forth a prima facie case of racial discrimination. Likewise, summary judgment was granted on the §1981 claim on the basis of Mr. Richardson's failure to set forth a prima facie case of racial discrimination. (Petition at A5-A11).

B. The Tenth Circuit.

Mr. Richardson appealed the district court's order to the United States Court of Appeals for the Tenth Circuit. After briefing by the parties, the Tenth Circuit issued its Order and Judgment in the case, affirming the district court's judgment in favor of Albertson's. (Petition at A1-A4). The Order and Judgment agreed with the district court's conclusions that Mr. Richardson failed to establish a prima facie case of racial discrimination, and

that the court lacked jurisdiction over his ADA claim based on his failure to adequately exhaust administrative remedies. (*Id.*) Mr. Richardson filed a petition for rehearing which was denied by the Tenth Circuit on September 16, 1996.

ARGUMENT

I.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BASED ON MR. RICHARDSON'S FAILURE TO PRESENT COMPELLING REASONS JUSTIFYING REVIEW OF THE TENTH CIRCUIT'S DECISION.

As stated in Supreme Court Rule 10, a petition for a writ of certiorari will be granted only for compelling reasons and "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." While the fourteen "Questions Presented" set forth in Mr. Richardson's petition are practically unintelligible, it is clear that the petition consists entirely of assertions of erroneous factual findings (Questions Presented numbers 3, 4, 5,[4] 6, and 13) or misapplied legal standards (Questions Presented numbers 1, 2, 7, 8, 9, 10, 11, 12, and 14). (Petition at i-ii). Most of the purported facts Mr. Richardson offers to support his claims of discrimination are not properly before this Court. (Petition at 3-4). None of Mr. Richardson's facts are supported by a single citation to the record

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[4] Pursuant to Supreme Court Rule 15.2, Albertson's points out that Mr. Richardson's Question Presented number 5 ("How can the Defendant write up the Plaintiff simply for asking for a promotion?") would not properly be before the Court if certiorari were granted. This particular factual determination was not at issue below and was thus not preserved for review. *United States v. Williams*, 504 U.S. 36, 44 (1992) (party raising error must have raised the issue below and the issue must have been expressly relied upon by the court below).

below, and in fact, are not part of the record because they were never properly presented to the district court.[5] Such unsupported assertions of error do not present "compelling reasons" justifying review of the Tenth Circuit's decision.

A. The Petition Presents No Issues Of Conflict Among the Courts of Appeals or Between the Tenth Circuit and This Court.

The petition does not present issues in which there are conflicts among the courts of appeals or between the Tenth Circuit and this Court (which this Court has in the past indicated is a principal use of certiorari jurisdiction. *Braxton v. United States,* 500 U.S. 344, 347 (1991)). To the contrary, in reaching the conclusion that Mr. Richardson had not satisfied his initial burden of establishing a prima facie case of discrimination, the district court and the Tenth Circuit applied the well-established and universally accepted test (discussed below) set forth in this Court's decision in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). (Petition at A3 and A10-A11). There is absolutely no conflict between this Court and the Tenth Circuit's test for what a plaintiff in an employment discrimination case must show to survive summary judgment. The Tenth Circuit test is set forth in *Randle v. City of Aurora,* 69 F.3d 441, 451-53 (10th Cir. 1995), and is directly based upon this Court's opinions in *St.*

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[5] Federal courts routinely reject claims of error by parties who fail to provide citation to the record sufficient to determine whether an error occurred. *See, e.g., Gross v. Burggraf Constr. Co.,* 53 F.3d 1531, 1546 (10th Cir. 1995) ("Without a specific reference, we will not search the record in an effort to determine whether there exists dormant evidence which might require submission of the case to a jury. Judges are not like pigs, hunting for truffles buried in briefs.") (internal citations omitted).

Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993), and *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

Neither is there any conflict presented by the general legal standards used below in determining Albertson's summary judgment motion. The district court's analysis of Mr. Richardson's burden to establish a genuine issue of material fact in responding to Albertson's motion for summary judgment relied upon this Court's familiar and widely relied upon decision in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). (Petition at A8). Thus, none of the issues that form the basis of the petition can be characterized as issues in which the Tenth Circuit's Order and Judgment conflicts with a decision of this Court or of another United States court of appeals.

B. The Petition Presents No Circumstances Calling For Exercise of This Court's Supervisory Power Based on a Departure From the Accepted and Usual Course of Judicial Proceedings.

To the extent that Mr. Richardson's petition may be interpreted to request that the Court grant certiorari based upon the consideration that a "United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power" (Supreme Court Rule 10.1(a)), such argument should be rejected because this is not such a case and the "so far departed" test is only very rarely expressed as a basis for this Court to grant certiorari. To the contrary, this case presents a run-of-the-mill summary judgment decision based on well-established and correctly applied legal principles.

This Court relied on the "so far departed" test to grant certiorari in *New York City Transit Authority v. Beazer,* 440 U.S. 568 (1979). In that case, the Court found granting certiorari appropriate based on the court of appeals having affirmed on a constitutional issue without first resolving a statutory issue, which conflicted with an established judicial principle. 440 U.S. at 570-71 & n.1. In contrast, this Court denied certiorari under the "so far departed" test in *Key v. Wise,* 454 U.S. 1103 (1981). In Justice Brennan's dissent, he noted that even the prevailing party below acknowledged that the court of appeals egregiously erred in reaching its decision, the case presented fundamental jurisdictional issues of great importance, that it was an appropriate case for review under the "so far departed" test, and that the decision below should be summarily reversed. 454 U.S. at 1105 (Brennan, J., dissenting).

The present case is certainly not as significant as *Beazer,* as there are no constitutional issues involved. Nor does it present egregious errors or jurisdictional issues that in *Key v. Wise* were only significant enough to provoke a dissent from the denial of the petition for a writ of certiorari. Here, the only issues which would be properly before the Court if certiorari were granted concern whether the district court properly applied undisputed legal standards in resolving a run-of-the-mill summary judgment motion. Such issues are not what is contemplated by this Court's "so far departed" test, or review on certiorari generally. Therefore, Mr. Richardson's petition should be denied.

II.

THE TENTH CIRCUIT CORRECTLY DETERMINED THAT MR. RICHARDSON FAILED TO ESTABLISH A PRIMA FACIE CASE OF RACIAL DISCRIMINATION.

The district court and Tenth Circuit correctly dismissed Mr. Richardson's Title VII and §1981 claims based on his inability to establish a prima facie case of racial discrimination. To prevail on a claim of racial discrimination under Title VII, a plaintiff must show that his race was a motivating factor for the employment action of which he complains. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). As set forth in *McDonnell Douglas,* the plaintiff in a Title VII action must first establish by a preponderance of the evidence a prima facie case of racial discrimination. *Id.* The burden then shifts to the defendant to show a legitimate nondiscriminatory reason for the challenged employment decision. *Id.* If the defendant meets its burden, the plaintiff may then show that the legitimate reasons offered by the employer were merely a pretext for unlawful discrimination. *Id.* at 804; *Randle v. City of Aurora,* 69 F.3d 441, 451 (10th Cir. 1995). The same analysis applies to a §1981 claim. *Patterson v. McLean Credit Union,* 491 U.S. 164, 186-87 (1989) (superseded by statute on other grounds); *Randle,* 69 F.3d at 450.

To set forth a prima facie case of racial discrimination, Mr. Richardson was required to prove that: (1) he belongs to a protected class; (2) he was qualified for the position of baker; (3) he was terminated for violating a work rule; and (4) similarly situated nonminority employees were treated differently. *Equal Employment Opportunity Comm'n v. Flasher Co., Inc.,* 986 F.2d 1312, 1316 (10th Cir. 1992); *Allen v. Denver Pub. Sch. Bd.,* 928 F.2d 978, 985 (10th Cir. 1991).

Mr. Richardson failed to present any evidence whatsoever of racial discrimination beyond his own conclusory, unsupported allegations that white coworkers were treated more favorably than he was. Mr. Richardson failed even to identify any nonminority coworkers who were treated differently. Rather, the undisputed evidence establishes that Caucasian employees were required to provide doctor's notes after being absent from work for two or more days, just as Mr. Richardson was required to do. (Doc. 46 at Ex. B-4, ¶23). In addition, two Caucasian employees were discharged from their employment at the same store for failure to report to work as scheduled. (*Id.* at ¶24). Mr. Richardson himself acknowledged that he did not know whether other employees were required to, or actually did, provide doctors' notes; rather, he merely believed that they were not required to do so. (Doc. 46 at Ex. A – 183:24-186:1; 186:19-187:1).

In his pleadings filed with the Tenth Circuit, Mr. Richardson referred to "his witness" who could prove his prima facie case. Yet Mr. Richardson never identified the witness or provided any evidence, through affidavit or otherwise, regarding the witness' anticipated testimony. A general reference to an anonymous witness in the pleadings is insufficient to raise a genuine issue of material fact. As the Tenth Circuit correctly held, mere conclusory allegations unsupported by any evidence are not enough to withstand a properly supported motion for summary judgment. (Petition at A4).

III.

THE TENTH CIRCUIT CORRECTLY DETERMINED THAT THE DISTRICT COURT LACKED JURISDICTION OVER MR. RICHARDSON'S ADA CLAIM BECAUSE HE FAILED TO ADEQUATELY EXHAUST HIS ADMINISTRATIVE REMEDIES.

The undisputed evidence presented to the lower courts established that Mr. Richardson failed to exhaust his administrative remedies with respect to his claim of disability discrimination under the ADA. Before bringing a claim in federal court under Title VII or Title I of the ADA, the charging party must exhaust his administrative remedies. 42 U.S.C. §2000e-5; 42 U.S.C. §12117(a); *Khader v. Aspin,* 1 F.3d 968, 970 (10th Cir. 1993). An employee who refuses or fails to provide sufficient information so that the agency can evaluate the merits of his claim "cannot be deemed to have exhausted administrative remedies" and the claims must be dismissed. *Khader,* 1 F.3d at 971 & n.2. As specifically stated in the EEOC's determination letter of April 21, 1994, Mr. Richardson failed to provide any documentation upon which the EEOC could determine whether he was a qualified individual under the ADA. (Doc. 46 at Ex. A, Richardson Dep. Ex. 26). Mr. Richardson never offered any evidence in dispute of this statement. Thus, Mr. Richardson failed to adequately exhaust his administrative remedies and the district court and Tenth Circuit correctly found that jurisdiction could not be exercised over his ADA claim.

CONCLUSION

For the reasons set forth above, Respondent Albertson's, Inc. respectfully requests that this Court deny Petitioner Robert Richardson's petition for a writ of certiorari.

Respectfully submitted this 25th day of March, 1997,

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